No. 86-1404

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MISSOURI PACIFIC RAILROAD COMPANY,
Petitioner,

vs.

JIMMY PAUL BESSE,
Respondent.

On Petition For A Writ of Certiorari To The Supreme Court of Missouri

BRIEF FOR RESPONDENT IN OPPOSITION

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The opinion of the Supreme Court of Missouri, en banc, affirming the judgment and verdict in favor of plaintiff in the trial court, is reported at 721 S.W.2d 740, and appears in the Petition as Appendix A, page A1. The opinion of the Missouri Court of Appeals, Eastern District is not reported because, under Missouri law, when the case is transferred to the Supreme Court by order of either that Court or the Court of Appeals, the Court of Appeals opinion is, in effect, vacated and of no precedential value and the case is decided by the Supreme Court as if on original appeal. See Rule 83.09, Missouri Rules of Civil Procedure. Petitioner has made that opinion a part of the Appendix to the Petition, and it appears as Appendix B at page A13. The judgment of the trial court appears in the Petition as Appendix C, at page A21.

JURISDICTIONAL STATEMENT

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. Section 1257(3). Respondent specifically denies that jurisdiction of any of the questions petitioner seeks to present is conferred upon this Court under Section 1257(3) for the reason, as will be more fully set forth below, that the judgment of the Missouri Supreme Court, en banc, with respect to the issues raised by petitioner, rests upon an independent and adequate state ground of decision, which bars review in this Court.

Respondent agrees that the Petition was timely filed within ninety (90) days of the decision below.

STATEMENT OF THE CASE

Petitioner's statement of the case does not constitute a fair and full statement of the facts relevant to the issues herein. In order to avoid repetition, additional relevant facts will be set forth under the appropriate point in the argument.

ARGUMENT

I.

The Writ Should Be Denied Because This Court Is Without Jurisdiction Of The Questions Petitioner Seeks To Present, In That The Judgment Of The Missouri Supreme Court Rests Upon An Independent And Adequate State Ground Of Decision.

This Court is without jurisdiction of any of the purported questions which Petitioner seeks to present. Each of those questions relates to petitioner railroad's claim that it is entitled to reversal of the judgment in respondent's favor because the jury was not given a present value instruction. However, there is one significant fact which is dispositive of this petition: **Petitioner never requested the trial court to give such an instruction.** The Missouri Supreme Court held that petitioner's claim had not been preserved for review as a matter of state procedural law precisely because of petitioner's failure to request the instruction at trial and did not, accordingly, reach that claim. The Missouri Supreme Court clearly acknowledged that this Court has held:

> . . . that the giving of such an instruction was mandated by federal law when requested. *St. Louis Southwestern Ry. Co. v. Dickerson,* 470 U.S. 409, 105 S.Ct. 1347, 84 L.Ed.2d 303 (1985)."

721 S.W.2d at 744. The Missouri Supreme Court held, however, that:

> "Under our procedural law, the trial court need not give an instruction unless a correct instruction is prepared and requested by counsel. Federal causes are tried in state courts under state procedural rules. The Supreme Court of the United States has the ultimate right to specify the matters about which FELA juries must be instructed, **but the parties must make appropriate requests.**"

721 S.W.2d at 744 (Emphasis Supplied). Thus, the Missouri Supreme Court held that the failure to request the instruction at trial "concludes the defendant." *Id.* This constitutes an independent and adequate state ground of decision which bars review in this Court. *E.g., Herb v. Pitcairn,* 324 U.S. 117, 65 S.Ct. 459 (1945); *Murdock v. City of Memphis,* 20 Wall. (87 U.S.) 590, 22 L.Ed. 429 (1875); *Eustis v. Bolles,* 150 U.S. 361, 14 S.Ct. 131 (1893); *Enterprise Irrigation District v. Farmers Mutual Canal Co.,* 243 U.S. 157, 37 S.Ct. 318 (1917); *Fox Film Corp. v. Muller,* 296 U.S. 207, 56 S.Ct. 183 (1935); *Michigan v. Tyler,* 436 U.S. 499, 512 n.7, 98 S.Ct. 1942, 1951 n.7 (1978). The adequacy and independence of the state ground is evident from the face of the opinion of the Missouri Supreme Court and fully meets the test of *Michigan v. Long,* 463 U.S. 1032, 1042, 103 S.Ct. 3469, 3476 [7, 8] (1983). Therefore, this Court is without jurisdiction to review any of the purported questions petitioner seeks to raise.

A refusal by a state court to reach the merits of a federal claim due to a failure to raise the claim in accordance with state procedural rules constitutes an independent and adequate state procedural ground for decision which will preclude review by this Court so long as the state's insistence upon compliance with that rule serves a legitimate state interest. *Henry v. Mississippi,* 379 U.S. 443, 448, 85 S.Ct. 564, 567 (1965).

The state procedural rule applied by the Missouri Supreme Court—that petitioner was required to prepare and request a present value at trial in order to preserve the issue for appeal—and that court's insistence on compliance with the rule, serves such a legitimate state interest. The Missouri rule is in fact similar to Rule 51 of the Federal Rules of Civil Procedure. This Court recently explained the interests served by rules, such as Rule 51 F.R.C.P., were as follows:

> "Orderly procedure requires that the respective adversaries' views as to how the jury should be instructed be presented to the trial judge in time to enable him to deliver an accurate charge and to minimize the risk of committing reversible error."

Henderson v. Kibbe, 431 U.S. 145, 154, 97 S.Ct. 1730, 1736 (1977). This Court has characterized the state rule that a failure to object to a jury instruction at trial is a waiver of any claim of error as "normal and valid". *Hankerson v. North Carolina,* 432 U.S. 233, 244 n.8, 97 S.Ct. 2339, 2345-46 n.8 (1977). See also Rule 30 F.R.C.P. This Court has also very recently stated that the rule that it will not consider issues not raised or litigated below has "special force where the party seeking to argue the issue has failed to object to a jury instruction" pursuant to Rule 51. *City of Springfield v. Kibbe,* ____ U.S. ____, 107 S.Ct. 1114, 1115 (1987).

Not only is Missouri's rule "normal and valid", it does not in any manner unnecessarily burden the assertion of federal rights, nor is it applied discriminatorily to bar assertion of federal rights. To the contrary, it is consistently applied to the entire range of civil cases tried in the Missouri Courts. See review of Missouri rule and case law at pp. 7-8, n. 2 *infra.*

In the instant case, all of the instructions given by the trial court were identical to those prepared and submitted by the petitioner herein, defendant below, Missouri Pacific Railroad Company. The trial court gave each and every instruction which had been drafted, offered and requested by the petitioner. No present value instruction was drafted, offered or requested by the petitioner. Furthermore, the trial court did not refuse any present value instruction.

The transcript of the proceedings at the instruction conference (See Appendix, pp. A-1 to A-4) demonstrates that respondent's counsel, petitioner's counsel and the trial court had conferred concerning the instructions on the previous day. At that time, respondent had indicated his intention to have the court submit the case under the Missouri Approved Instructions (MAI) applicable to FELA cases (i.e., MAI 24.01, 8.02 and 36.01). Petitioner, however, had prepared instructions it intended to offer which were not-in-MAI. Petitioner's instructions had not and have never been approved by the Missouri

Supreme Court for use in FELA cases. Despite the fact that respondent had prepared and intended to submit the case under the applicable MAI FELA instructions and **petitioner had drafted and was prepared only to submit and offer its not-in-MAI, unapproved instructions, respondent acceded to petitioner's request and agreed to submit the case under the not-in-MAI instructions.** This is a permissible practice under Rule 70.02(b) V.A.M.R. which provides:

> "(B) **Missouri Approved Instructions exclude others.** Whenever Missouri approved instructions contains an instruction applicable in a particular case **which the appropriate party or the court decides to submit, such instruction shall be given to the exclusion of any other on the same subject.**"

This rule provides that the MAI instructions are exclusive, **if the appropriate party or the court decides to submit same.** In the instant case, however, respondent did not invoke his right to have the case submitted in accordance with the applicable MAI FELA instructions. Instead, respondent adopted **petitioner's not-in-MAI** unapproved instructions. Moreover, the trial court also permitted the case to go to the jury on **petitioner's not-in-MAI** instructions.

Prior to the trial of the instant case, the Missouri Courts had held that a defendant railroad was entitled to a present value instruction, upon request, when the instruction was not precluded by the exclusivity of MAI.[1] *See, e.g., Prince v. Kansas City*

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[1] *Dunn v. St. Louis-San Francisco Railway Company,* 621 S.W.2d 245, 253 [14] (Mo. banc 1981) *cert. den. sub. nom., Burlington Northern Railroad Company v. Dunn,* 454 U.S. 1145, 3102 S.Ct. 1007, 71 L.Ed.2d 298 (1981) held only that the MAI FELA damage instruction, submitted by plaintiff and given by the Court, was not to be further explained by a separate damage instruction submitted by defendant. In *Bair v. St. Louis-San Francisco Railway Company,* 647 S.W.2d 507, 510, 513 [2, 3, 12] (Mo. banc 1983) *cert. denied sub. nom. Burlington Northern, Inc. v. Bair,* 464 U.S. 830, 104 S.Ct. 107 78 L.Ed.2d 109 (1983), the Missouri Supreme Court followed *Dunn* on the in-

Southern Ry. Co., 229 S.W.2d 568, 575 [9] (Mo. 1950) where the Missouri Supreme Court expressly approved of the giving of such a present value instruction, on request, in an FELA case. **The same line of decisions also held that a railroad defendant was not entitled to raise an allegation of error on appeal concerning the absence of a present value instruction if the railroad had failed to request a present value instruction at trial during the instruction conference.** *Holman v. St. Louis-San Francisco Ry. Co.*, 278 S.W. 1000, 1008 (Mo. 1926), *Clark v. Chicago, R.I. & P. Ry. Co.*, 300 S.W. 758, 763-764 (Mo. 1927), *Moran v. Atchison, T. & S.F. Ry. Co.*, 48 S.W.2d 881, 887-888 (Mo. banc 1932), *cert. den.*, 287 U.S. 621, 53 S.Ct. 21, 77 L. Ed. 539 (1932), *Hancock v. Kansas City Terminal Ry. Co.*, 100 S.W.2d 570, 572-573 (Mo. 1936), *Wheeler v. Missouri-Kansas-Texas R. Co.*, 205 S.W.2d 906, 908 (Mo.App. 1947), *Pierce v. New York Cent. R. Co.*, 257 S.W.2d 84, 89-90 (Mo. 1953), and *Chaussard v. Kansas City Southern Railway Company*, 536 S.W.2d 822, 827 (Mo.App. 1976); *see also, Burtch v. Wabash Ry. Co.*, 236 S.W. 338 (Mo. 1921), *Pope v. Terminal R. Ass'n. of St. Louis*, 254 S.W. 43 (Mo. 1923). Said decisions had been rendered both before the Missouri Supreme Court's adoption of MAI (*see, Pierce v. New York Cent. R. Co.*, 257 S.W.2d 84, 89-90 (Mo. 1953) and after the adoption of MAI (*see, Chaussard v. Kansas City Southern Railway Company*, 536 S.W.2d 822, 827 (Mo.App. 1976)).

Nine previous Missouri appellate decisions had held that the railroad defendant's failure to request a present value instruction precluded the defendant from raising the absence of said

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structional issue but expressly recognized that present value was the proper measure for loss of future wages, that evidence was admissible and that argument concerning present value was proper. As to the instruction, both *Dunn* and *Bair* based their holdings *solely* on the exclusivity of MAI instructions when offered by the appropriate party and given by the Court. In this case, the exclusivity of MAI was not invoked. Therefore, *Dunn* and *Bair*, and the decisions of the Missouri Court of Appeals following *Dunn* and *Bair*, had no application to this case.

instruction as an allegation of error on appeal.[2] Despite said ap-

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[2] The application of this rule to present value instructions and FELA actions is simply one application of the well engrained Missouri procedural rules relating to jury instructions in civil cases. As a matter of Missouri procedural law, a trial court has no duty to instruct upon any issue of law in a case unless a party has drafted and requested that a proper jury instruction be given. *Wors v. Glasgow Village Supermarket, Inc.*, 460 S.W.2d 583, 589 [6] (Mo. 1970); *Sheinbein v. First Boston Corporation*, 670 S.W.2d 872, 878 [10] (Mo.App. 1984). If a party drafts and requests the Court to give an improper instruction, the trial court has no duty to either correct the instruction or prepare a proper instruction in its place. *Wors v. Glasgow Village Supermarkets, Inc.*, 460 S.W.2d 583, 589 [6] (Mo. 1970); *Sheinbein v. First Boston Corporation*, 670 S.W.2d 872, 878 [10] (Mo.App. 1984). Moreover, a trial court—in a civil case—has absolutely no duty to prepare a party's instructions under any circumstances. *Parker v. Wallace*, 431 S.W.2d 136, 139 [12] (Mo. 1968); *Sullivan v. KSDK/KSD-TV*, 661 S.W.2d 49, 51 [3, 4] (Mo.App. 1983). Consequently, it has been repeatedly held that a party cannot complain on appeal of the trial court's failure to instruct upon any issue of law unless that party has drafted a proper jury instruction on that issue, requested the trial court to give that instruction, the trial court has refused to give the instruction and the complaining party has moved for a new trial based upon the trial court's refusal to give the requested instruction. *See, Verdin v. Agners*, 715 S.W.2d 544, 546 [2] (Mo.App. 1986); *Hicks v. Smith*, 696 S.W.2d 855, 856 [2] (Mo.App. 1985); *Sullivan v. KSDK/KSD-TV*, 661 S.W.2d 49, 51 [3, 4] (Mo.App. 1983). *See also, Day v. Wells Fargo Guard Service Co.*, 711 S.W.2d 503, 507 n.1 (Mo. banc 1986); *Hodge v. Continental Western Insurance Company*, 722 S.W.2d 133, 136 [3] (Mo.App. 1986); *Manufacturer's American Bank v. Stamatis*, 719 S.W.2d 64, 69 [7] (Mo.App. 1986); *DeLong v. Osage Valley Electric Cooperative Association*, 716 S.W.2d 320, 232 [3] (Mo.App. 1986). Here, petitioner did not draft a present value instruction, did not request the trial court give a present value instruction, the trial court did not refuse to give a present value instruction, and petitioner did not move for a new trial upon said basis. Therefore, the Missouri Supreme Court held, consistently with other Missouri decisions on this issue, that as a matter of state procedural law petitioner was precluded from raising its allegation of error on appeal. *See, Day v. Wells Fargo Guard Service Co.*, 711 S.W.2d 503, 507 (Mo. banc 1986) and dissenting opinion where the Missouri Supreme Court, in a strikingly similar procedural situation, held the defendant's failure to properly challenge an instruction at trial precluded review of the instruction on appeal.

pellate decisions as well as respondents' and the trial court's willingness—documented in the record—to not invoke the exclusivity of MAI and Rule 70.02(b) and in fact adopt every one of **petitioner's not-in-MAI** instructions, this petitioner still did not request that a present value instruction be given. Petitioner failed to request such an instruction even though the above-referenced Missouri decisions repeatedly ruled that a defendant's failure to request the instruction precluded defendant from raising any allegation of error on appeal with regard to the lack of a present value instruction. Indeed, petitioner failed to request said instruction even though respondent and the trial court repeatedly urged and prodded petitioner to advise of any errors or deficiencies in the instructions. (See App. pp. A-1 - A-4) Rather than advise respondent and the trial court of the alleged deficiency—lack of a present value instruction—that petitioner now requests this Court to review, petitioner sat mute merely objecting "generally" to the instructions which it had itself drafted and submitted, **but never drafting, submitting, nor requesting—as it was required to do—a present value instruction.** Nor did petitioner—as it was required to do—take the additional required step of moving for a new trial based upon its present value instruction arguments.

As pointed out immediately above, petitioner simply did not request—as it was required to do—a present value instruction. Nor did petitioner take the second further required step of moving for a new trial based upon the failure of the trial court to instruct upon present value. Only after new counsel were obtained and the case had been appealed did petitioner—for the first time—attempt to raise the issue of lack of a present value instruction. The Missouri Supreme Court, en banc, affirmed concluding petitioner was not entitled to raise on appeal the absence value instruction because none was requested. *Zesse v. Missouri Pacific Railroad Company,* 721 S.W.2d 740, 741 (Mo.banc 1986). Here, petitioner's failure to prepare and request a present value instruction (as well as its later failure to raise the issue in its motion for new trial) precluded petitioner's claim of error as a matter of Missouri State procedural law.

In the instant case, respondent adduced evidence that he had sustained a past wage loss of approximately $100,000 between the date of his injury and the time of trial. In addition, respondent adduced evidence of his current (1984) wage and fringe benefit rates. Respondent did not project nor attempt to project any future increases in wages or fringe benefits.[3]

Petitioner did not object to the admission of any of respondent's evidence concerning his past or future wage loss. Nor did petitioner offer any evidence whatsoever with respect to respondent's past or future wage loss. Nor did petitioner offer any evidence pertaining to the present value of respondent's future wage loss. Notably, the Missouri State Supreme Court rendering the decision in the instant case had immediately prior to the *Besse* decision held in *Nesselrode v. Executive Beechcraft, Inc.*, 707 S.W.2d 371, 387-388 [5-7] (Mo.banc 1986) that a defendant — in very similar circumstances — was precluded from asserting, on appeal, error arising from plaintiff's presentation concerning future loss of wages and present value.

Moreover, it is clear that both petitioner and respondent (Petition for Certiorari, pp. 4-5, n.1) expressly advised the jury

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[3] In this regard, the evidence demonstrated respondent's wage rates had incrased 301% ($4.38 to $13.20) during the period from 1971-1984 (Pl. Ex. 49). Similarly, respondent's fringe benefits had increased from in the range of 200% (Pl. Ex. 50) to 558% (Pl. Ex. 51) during the approximately 10-12 years prior to trial. Thus, although respondent's evidence did not give petitioner the benefit of applying a discount rate, neither did it give respondent the benefit of anticipating future increases due to price inflation or improved societal productivity. These factors tend to offset one another. *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 550-551 n. 31 and accompanying text, 103 S.Ct. 2541, 2557 n.31 and accompanying text (1983) This Court in *Pfeifer* recognized that a damage computation discounting an award of future lost earnings by a market interest rate without taking into account the extent to which such a rate either anticipates or is offset by future price inflation or societal productivity gains may produce an inadequate award, under compensating an injured plaintiff. 462 U.S. at 541-542, 103 S.Ct. at 2552.

"present value" was the proper measure of damages. The jury, therefore, was properly advised even though petitioner utterly failed to draft or request a present value instruction.

A point which should be made clear is that the instructions drafted and submitted by petitioner and given by the trial court with the express acquiescence of respondent were not only not-in-MAI instructions but were, in fact, prohibited by MAI. The verdict director, comparative fault instruction and form of verdict were the type that the Missouri appellate courts have held were not to be given in FELA cases. *Anderson v. Burlington Northern Railroad Company,* 700 S.W.2d 469, 478-479 [19, 20] (Mo.App. 1985), *cert. den.* ____ U.S. ____, 106 S.Ct. 1975 (1986). Respondent's counsel permitted petitioner's counsel to instruct in this manner even though the same counsel had successfully objected to said instructions in *Anderson.* Moreover, the damage instruction contained language (e.g. "direct result") which was specifically prohibited by MAI[4] and prior Missouri appellate decisions. *See, Snyder v. Chicago, Rock Island & Pacific Railroad Company,* 521 S.W.2d 161, 165 [11, 12] (Mo.App. 1973) wherein the Missouri Court of Appeals reversed a judgment in favor of defendant railroad because it included the prohibited language, "direct result", in the railroad's converse instruction.

The point is that neither respondent nor the trial court restricted petitioner to MAI FELA instructions. To the contrary, petitioner drafted and submitted and the trial court gave instructions which were not-in-MAI and in fact were prohibited

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[4] See Committee's Comment (1981 Revision) wherein it is stated that: "This instruction is used only in an F.E.L.A. case wherein the employee sustained injury. It is a duplication of MAI 4.01 with two exceptions. The word "*direct*" is deleted from the fifth line of MAI 4.01. *This is required in an F.E.L.A. case* so that the instruction complies with the correct substantive law, *Wilmoth v. Rock Island ry.*, 486 S.W.2d 631 (Mo. 1972); *Crane v. Cedar Rapids & Iowa City Ry. Co.*, 395 U.S. 314 (1969); and *Rogers v. Mo. Pac. Ry.*, 352 U.S. 500 (1957)."

by MAI. Respondent abandoned his own MAI FELA instructions and permitted petitioner's instruction to be given even though respondent could have excluded said instructions. Petitioner, nonetheless, never drafted nor requested the not-in-MAI present value instruction it *now* contends it desired.

Petitioner's not drafting or submitting a present value instruction, at trial, is consistent with the rest of petitioner's trial strategy. Although petitioner argued as it had a right to the earning power of money and present value, not once during petitioner's argument did it suggest any sum that represented or reflected the present value of respondent's future loss of earnings. Nor did petitioner suggest any sum that represented petitioner's opinion of fair and just compensation for respondent's injuries. Rather petitioner assiduously and studiously avoided any suggestion that the jury should return any amount for respondent, contending instead that the jury should return a defendant's verdict. Given the fact petitioner intended to request a defendant's verdict, intended to not suggest any sum of money as that which would fairly and justly compensate respondent, and intended not to suggest any sum as the present value of respondent's future loss of earnings, it is not surprising that it neither desired nor requested a present value instruction nor moved for a new trial because none was given.

For the foregoing reasons, it is respectfully submitted that, on this record, petitioner's failure to request a present value instruction at trial is clearly an independent and adequate state ground which precludes review in this Court.

Petitioner's focus on the retroactivity of *Dickerson* is no more than an attempt to divert attention from petitioner's procedural default. *Dickerson* unquestionably applies retroactively to cases pending on direct review when it was decided but the right to claim that retroactive application presupposes that the issue has been properly raised and preserved in accordance with state procedural law. This Court has explicitly recognized the difference between a holding that a given decision is to be accorded complete retroactive effect and the right of a litigant to

claim that retroactive application after a procedural default. Even when a decision is accorded complete retroactive effect, a state court may still enforce "the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error." *Hankerson v. North Carolina,* 432 U.S. 233, 244 n.8, 97 S.Ct. 2339, 2345-6 n.8 (1977); *Engle v. Issac,* 456 U.S. 107, 134 n.43 and accompanying text, 102 S.Ct. 1558, 1575 n.43 and accompanying text (1982). The question before this Court is not whether *Dickerson* applies retroactively. The question is whether this petition may invoke the jurisdiction of this Court to claim that retroactive application when the state court has refused to reach the issue because petitioner did not properly raise and preserve the issue under state procedural law by requesting a present value instruction at trial. The answer, as demonstrated above, is "No."

Finally, in addition to thencases cited above, the Court's attention is also respectfully invited to the recent decision in *City of Springfield v. Kibbe,* ____ U.S. ____, 107 S.Ct. 1114 (1987). In *Kibbe,* which arose in the federal system, this Court dismissed a writ of certiorari as improvidently granted when it became apparent that the petitioner had not raised any objection at trial to instructions containing the standard of liability it sought to challenge in this Court. In so doing this Court observed:

> "[1] We ordinarilly will not decide questions not raised or litigated in the lower courts. See *California v. Taylor,* 353 U.S. 553, 556, n.2, 77 S.Ct. 1037, 1039, n.2, 1 L.Ed.2d 1034 (1957). That rule has special force where the party seeking to argue the issue has failed to object to a jury instruction, since Rule 51 of the Federal Rules of Civil Procedure provides that "[n]o party may assign as error the giving...[of] an instruction unless he objects thereto before the jury retires to consider its verdict."

____ U.S. at ____, 107 S.Ct. at 1115.

There was, of course, no jurisdictional bar because the case arose in the federal, not the state courts. This Court nevertheless held:

> "We think, however, that there would be considerable prudential objection to reversing a judgment because of instructions that the petitioner accepted, and indeed itself requested."

____ U.S. at ____, 107 S.Ct. at 1116. As set forth above, the instructions given by the trial court in the instant case were similarly prepared and accepted by this petitioner.

The writ should be denied.

II.

Petitioner's Suggestion That This Court Adopt The "Cause And Actual Prejudice" Standard Used In Habeas Corpus Cases In This Civil Case On Direct Review Is Completely Without Merit And Is Contrary To The Well Established Distinctions Between This Court's Appellate Jurisdiction Under 28 U.S.C. §1257 And The Federal Habeas Jurisdiction. Further, This Petitioner, On This Record, Cannot Satisfy The Cause And Actual Prejudice Test In Any Event.

Petitoner's argument that this Court adopt the "cause and actual prejudice" standard employed by this Court in habeas corpus cases, see *Wainwright v. Sykes,* 435 U.S. 72, 97 S.Ct. 2497 (1977), to avoid the independent and adequate state procedural ground of decision which deprives this Court of jurisdiction of this civil case on direct review is totally without merit. In support of its contention, petitioner makes the following extraordinary and blatantly erroneous statement, *ipse dixit:*

> The same standard [habeas corpus cause and actual prejudice test] should be applied to a question of waiver of a federal substantive right in civil cases tried in state courts as a result of a default under state procedural rules *because the same considerations govern both issues.*

Petition at 11 (bracketed material and emphasis supplied). Such a statement evidences an almost incomprehensible lack of appreciation for the special role set aside for habeas corpus in our

law and tradition and the manner in which that role differs from the role and jurisdiction of this Court on direct review of state court judgments.

The source and the scope of the power of the federal courts to inquire into whether a person is being confined in violation of the Constitution in a habeas corpus proceeding is fundamentally different, and substantially broader, than the source and scope of the power and jurisdiction of this Court with respect to state court civil judgments on direct review. This is no less so when the refusal of a state court to grant relief claimed under federal law is based upon a procedural default under state law, which is said to constitute an independent and adequate state ground of decision. This Court has expressly held and recognized that procedural defaults *bar* this Court from considering an allegation of error, on direct review, because of the independent and adequate state ground exception of 28 U.S.C. §1257, even though the identical procedural default would not bar habeas jurisdiction under 28 U.S.C. §2254. In *Fay,* this Court stated:

> *The doctrine under which state procedural defaults are held to constitute an adequate and independent state law ground barring direct Supreme Court review* is not to be extended to limit the power granted the federal courts under the federal habeas statute.

Fay v. Noia, 372 U.S. 391, 399, 83 S.Ct. 822, 827 (1963) (Emphasis supplied). The existence of an independent and adequate state procedural ground for decision precludes direct review by this Court as a matter of jurisdiction and power. To the extent a federal habeas court recognizes such procedural defaults as a bar to reaching constitutional claims, it does so only as a matter comity and not due to a lack of power. See generally, *Fay v. Noia,* 372 U.S. 391, 429-431, 83 S.Ct. 822, 824 (1963); *Wainwright v. Sykes,* 433 U.S. 72, 81-87, 97 S.Ct. 2497, 2503-2506 (1977). *Fay* and *Wainwright* both emphasize the heavy burden placed upon federalism concerns by the broad scope of federal habeas jurisdiction, burdens justified only by the special con-

stitutional role of the writ of habeas corpus in our system, a factor which is not present in direct review of state civil judgments.

Adoption of petitioner's argument would not only disregard those federalims concerns and the statutory limits imposed upon this Court's appellate jurisdiction by 28 U.S.C. §1257, but would also vastly increase the burden of this Court's workload. Every losing litigant in a state civil case would thereby be given an incentive to search the record for a federal issue to support a request for this Court to review the judgment, and to seek to evade the consequences of failure to properly raise and present the issue in the state courts by appeal to this "cause and prejudice" standard. Since the "cause and prejudice" standard is employed in habeas cases to evaluate appellate defaults as well as defaults at trial, *Murray v. Carrier,* ____ U.S. ____, 106 S.Ct. 2639 (1986), litigants would be invited to try to raise federal issues for the first time in this Court, a practice which would be directly contrary to the plain language of 28 U.S.C. §1257 and this Court's consistent position that it is without jurisdiction of alleged federal questions which have "never been raised, preserved or passed upon in the state courts below". *Cardinale v. Louisiana,* 394 U.S. 437, 438, 895 S.Ct. 1161, 1162 (1969). The doctrine of "cause and prejudice" developed under *Wainwright v. Sykes* for federal habeas cases under 28 U.S.C. §2254, therefore, has no place and plays absolutely no role under 28 U.S.C. §1257.

Even if, *arguendo,* the "cause and prejudice" standard were held to apply in this civil case on direct review, petitioner would not be entitled to any relief. Petitioner's request to be excused from its procedural default completely and decisively fails to satisfy the "cause and prejudice" test.

With respect to "cause", the complete lack of merit in petitioner's arguments becomes readily apparent upon a comparison of *Engle v. Issac,* 456 U.S. 107, 102 S.Ct. 1558 (1982), with *Reed v. Ross,* 468 U.S. 1, 104 S.Ct. 2901 (1984), and an application of those cases to the record in the instant case. *Engle*

and *Reed* were both habeas cases which interpreted the "cause" aspect of the test with regard to failures of criminal defendants to object in state court to jury instructions placing the burden of proof of self-defense on defendants. In 1975, this Court, relying heavily on its prior decision in *In re Winship,* 397 U.S. 358, 90 S.Ct. 1068 (1970), decided *Mullaney v. Wilbur,* 421 U.S. 648, 95 S.Ct. 1881 (1975). The reasoning of *Mullaney* plainly and explicitly destroyed the validity of instructions requiring defendants charged with murder to prove the affirmative defense that the act was done in the heat of passion on sudden provocation to reduce the offense to manslaughter. *Mullaney* was thereafter widely regarded as also requiring in all cases that the State prove absence of self defense beyond a reasonable doubt. See *Engle,* 456 U.S. at 122 n.23 and accompanying text, 102 S.Ct. at 1569, n.23 and accompanying text. Although this Court has very recently declined to adopt such a broad rule, *Martin v. Ohio,* ____ U.S. ____, 107 S.Ct. 1098 (1987), that view of *Mullaney* formed the substantive basis of the habeas petitions in *Engle* and *Reed.* In each case, the question for decision was whether the habeas petitioners had demonstrated sufficient "cause" for their procedural defaults under the "cause and actual prejudice" test.

It is most respectfully urged and submitted that if it is assumed, *arguendo,* that the habeas "cause and actual prejudice" test is applicable to this civil case on direct review, *Engle* is controlling on this record and requires a finding in this case that there is insufficient cause for the railroad's procedural default.

In *Engle,* each of the three habeas petitioners had been tried in Ohio, two for homicide and the third for felonious assault, *after* the date of the decision in *Winship.* Two were tried in the five year period *after Winship but before Mullaney.* None made any objection at trial to instructions which required them to bear the burden of proof on self defense by a preponderance of the evidence. Each thereby violated Ohio's procedural rule requiring contemporaneous objections to jury instructions, a

default which was adequate, under Ohio procedural law, to bar appellate consideration of the issue.

In seeking to establish "cause" for their procedural defaults, the *Engle* habeas petitioners argued that it would have been futile to object to the instructions because Ohio had always consistently required defendant's to bear the burden of proof on self defense. They further argued that they could not have known that the Due Process Clause might invalidate those instructions. In rejecting the futility claim this Court held:

> "We note at the outset that the *futility of presenting an objection to the state courts cannot alone constitute cause for a failure to object at trial.* If a defendant perceives a constitutional claim and believes it may find favor in the federal courts, *he may not bypass the state courts simply because he thinks they will be unsympathetic to the claim. Even a state court that has previously rejected a constitutional argument may decide, upon reflection, that the contention is valid.* Allowing criminal defendants to deprive the state courts of this opportunity would contradict the principles supporting *Sykes.*"

456 U.S. at 130, 102 S.Ct. at 1573 (footnote omitted).

This Court further held that *Winship,* decided some four years prior to the defendants' state court trials, had laid the basis for their claims. Noting that other defense counsel after *Winship* used language from that case to challenge burden shifting instructions, this Court rejected the claim that the defendants had "cause" for their defaults because of alleged unawareness of the issue. This Court concluded that:

> "Where the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labeling alleged unawareness of the objection as cause for a procedural default."

456 U.S. at 134, 102 S.Ct. at 1575 (footnote omitted). In a footnote, this Court reiterated the principle set forth in the majority opinion in *Hankerson v. North Carolina,* 432 U.S. 233, 244 n.8, 97 S.Ct. 2339, 2345-46 n.8 (1977), that the States:

> . . . may be able to insulate past convictions [from the effect of *Mullaney*] by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error."

Quoted in *Engle,* 456 U.S. at 134 n.43, 102 S.Ct. at 1575 n.43 (bracketed material supplied by the Court in *Engle*). This Court went on to note that "we accept the force of that language as applied to defendants tried after *Winship." Id.* Thus, this Court in *Engle* held that there was insufficient cause to relieve the defendants from their state court procedural defaults in that case because each of the *Engle* petitioners was tried after *Winship,* and held that assertion of the burden of proof claims was accordingly barred because of the failure of the petitioner's to object to the instructions at their state court trials.

In *Reed v. Ross,* 468 U.S. 1, 104 S.Ct. 2901 (1984), this Court reached a different result in a habeas petition filed by a North Carolina prisoner who had failed to challenge instructions imposing upon him the burden of proving lack of malice and self-defense in his state court trial but whose trial had taken place *prior* to *Winship.* This Court found sufficient cause for the procedural default in *Reed,* not because of any allegation of futility, but because prior to *Winship* the idea of challenging such burden shifting instructions was so novel that the basis of the claim was not "reasonably available to counsel." 468 U.S. at ____, 104 S.Ct. at 2910. The test of novelty set forth by this Court presumes that the question be one sufficiently novel that it is safe to assume that counsel is unaware of its "latent existence", 468 U.S. ____, 104 S.Ct. at 2910, *so that a deliberate choice of any sort not to raise an issue of which counsel was aware cannot be attributed to counsel.*

On the record in the instant case, *Engle* compels the conclusion that the railroad has totally failed to establish "cause" for its procedural default. **Petitioner's argument is, essentially, the same futility argument rejected in** *Engle*. Just as the *Engle* petitioners claimed futility because the Ohio courts had long required defendants to bear the burden of proof on self defense, petitioner here claims futility because of Missouri decisions holding that, under MAI, it was not error to refuse a present value instruction. This Court held directly in *Engle:*

> "...that the futility of presenting an objection to the state courts cannot alone constitute cause for a failure to object at trial."

456 U.S. at 130, 102 S.Ct. at 1573. In addition, on this record as set forth above under Point I, petitioner's argument, that it did not request a present value instruction at trial because it was discouraged by prior Missouri decisions holding that it was not error to refuse the instruction because it was not in MAI, is particularly unconvincing in light of the willingness of both respondent's counsel and the trial court to accept and give instructions prepared by the railroad which also differed from and were contrary to MAI[3], and in light of the railroad's silence at trial in response to respondent's request and solicitation that it "advise the Court of any deficiencies or any problems with the instructions that are being given by the Court." (T. III, 465-466) (Appendix at A-4)

The railroad's argument, see Petition at 12-13, makes it clear that it was aware of the present value instruction issue at trial but deliberately chose not to raise it. The record refutes petitioner's claim of "cause".

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[3] In fact, given respondent's decision to accept petitioner's not-in-MAI instructions and his decision to not invoke the exclusivity of MAI, those cases had no application to the instant case. See n.1 at p. 6, *supra*.

Nor could the present value instruction be characterized as so novel at the time of trial in October, 1984, as to be unavailable within the meaning of *Reed*. To the contrary, as in *Engle*, the railroad's claims "were far from unknown at the time" of the trial here. 456 U.S. at 131, 102 S.Ct. 1558. This Court's discussion of that issue in *Dickerson* makes this clear. After noting that:

> "...it is settled that the propriety of jury instructions concerning the measure of damages in an FELA action is an issue of "substance" determined by federal law. *Norfolk & Western R. Co. v. Liepelt*, 444 U.S. 490, 493, 100 S.Ct. 755, 757, 62 L.Ed.2d 689 (1980)."

470 U.S. at ____, 105 S.Ct. at 1348, this Court went on to observe:

> "[3] Not only is it a federal question, but it is also one to which existing law provides a clear answer. Nearly seventy years ago, this Court held that a defendant in an FELA case is entitled to have the jury instructed that "when future payments or other pecuniary benefits are to be anticipated, the verdict should be made upon the basis of their present value only." *Chesapeake & Ohio R. Co. v. Kelly*, 241 U.S. 485, 491, 36 S.Ct. 630, 632, 60 L.Ed. 1117 (1916)....
>
> ...We have never disapproved of *Kelly* or its rationale. The federal Courts of Appeals have continued to rely on *Kelly* as a definitive statement of the law applicable to FELA cases, *see, e.g., Beanland v. Chicago R.I. & P.R. Co.*, 480 F.2d 109, 115 (CA8 1973), and we have ourselves recently reaffirmed our adherence to *Kelly's* principle that damage awards in suits governed by federal law should be based on present value. *See Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, ____, 103 S.Ct. 2541, ____, 76 L.Ed.2d 768 (1983)."

St. Louis Southwestern Ry. Co. v. Dickerson, 470 U.S. 409, ____, 105 S.Ct. 1347, 1348-49 (1985). Each of the cases cited

above was decided well before the trial in the instant case in October, 1984. *Kelly,* of course, although not a recent decision, was directly on point involving an FELA case tried in a state court.

Liepelt, decided in 1980, reasserted the role of federal substantive law as to the measure of damages in FELA actions and also expressly reaffirmed the continuing vitality of *Kelly:*

> "[1] Whether it was error to refuse that instruction, as well as the question whether evidence concerning the federal taxes on the decedent's earnings was properly excluded, is a matter governed by federal law. It has long been settled that questions concerning the measure of damages in an FELA action are federal in character. *See, e.g., Michigan Central R. Co. v. Vreeland,* 227 U.S. 59, 33 S.Ct. 192, 57 L.Ed. 417. This is true even if the action is brought in state court. *See, e.g., Chesapeake & Ohio R. Co. v. Kelly,* 241 U.S. 485, 491, 36 S.Ct. 630, 632, 60 L.Ed. 1117."

444 U.S. at 493, 100 S.Ct. at 755.

The Missouri Court of Appeals, Eastern District, implied its own awareness that the issue might warrant re-examination by its citation of *Kelly* in the original *Dickerson* opinion, 674 S.W.2d 165 (Mo.App. 1984) decided months before the trial in the instant case. After referring to the general MAI rules, the court cited *Kelly* in the following manner: "but cf. *Chesapeake & Ohio Railway Co. v. Kelly,* 241 U.S. 485, 36 S.Ct. 630, 60 L.Ed. 1117 (1916) (on writ of error to the Court of Appeals of Kentucky, the U.S. Supreme Court reversed and remanded the case because of the trial court's refusal to give a requested present value instruction)." 674 S.W.2d at 170.

The foregoing demonstrates that the existence of the present value issue was abundantly available to counsel for the railroad in the instant case. Comparing this case to *Engle* and *Reed, Liepelt* may be regarded as the direct analogue of *Winship,* in

that *Liepelt* clearly laid the modern basis of the present value instruction claim. Other counsel, notably counsel for the railroad in *Dickerson,* perceived and pressed the claim in a number of cases that railroads were entitled to the instruction upon request not withstanding the structure of MAI. See cases cited at p. 11-12 of the Petition. This was done by making the appropriate request at trial and preserving the issue in the appellate process. As this Court stated in *Engle:*

> "Where the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labeling alleged unawareness of the objection as cause for a procedural default."

456 U.S. at 134, 102 S.Ct. at 1575.

It should also be noted that this Court, in *Smith v. Murray,* ____ U.S. ____, 106 S.Ct. 2663 (1986), recently set forth its interpretation of *Engle* and *Reed,* one which is fully consistent with and supports the view of those cases set forth herein. See esp. 106 S.Ct. at 2667-68.

The foregoing demonstrates that this petitioner, whose case was tried long after *Liepelt,* has wholly failed to establish cause for its procedural default, just as the *Engle* petitioners failed, because their cases were tried after *Winship.*[6] Petitioner's contentions are completely without merit.

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[6] Nor can petitioner establish "actual prejudice." In this case, respondent's projection of his future wages and fringe benefits were based upon the level of wages and benefits in effect at the time of trial. No anticipated future increases in either wages or benefits due to price inflation or improved societal productivity were buit into the projections of the loss of future earnings. Future damages were computed in this manner despite the fact that the evidence as to past loss of earnings demonstrated a 301% increase in respondent's wage rates from 1971-1984 (Pl. Ex. 49) and an increase in respondent's in the range of 200% (Pl. Ex. 50) to 558% (Pl. Ex. 51) in the 10-12 years prior to trial. Thus, although respondent's evidence did not give petitioner the

III.

Even If It Is Assumed, Arguendo, That This Court Has Jurisdiction Of The Questions Petitioner Seeks To Present, The Writ Should Still Be Denied Because The Judgment Of The Court Below Reaches A Result In Accord With Settled Federal Substantive Law. The Judgment Does Not Therefor Warrant Review By This Court.

Even if it is assumed, *arguendo,* that this Court has jurisdiction of the questions Petitioner seeks to present, the writ should

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benefit of applying a discount rate, neither did it give respondent the benefit of anticipating future increase due to price inflation or improved societal productivity. These factors may well tend to offset one another. *Jones & Laughlin Steel Corp. v. Pfeifer,* 462 U.S. 523, 551 n.31 and accompanying text, 103 S.Ct. 2541, 2557 n.31 and accompanying text (1983). This Court in *Pfeifer* recognized that a damage computation discounting an award of future lost earnings by a market interest rate without taking into account the extent to which such a rate either anticipates or is offset by future price inflation or societal productivity gains may well produce an inadequate award, under compensating an injured plaintiff, 462 U.S. at 541-42, 103 S.Ct. at 2552.

Petitioner incorrectly asserts that *Pfeifer* "rejected" the total offset theory. (Petition at 9, n.4) *Pfeifer* held only that this Court would not impose the total offset method as a mandatory rule of federal decision over a defendant's objection at trial. This Court noted that the Carlson method, which posits that price inflation and societal productivity increases offset the entire market interest rate, has the virtue of simplicity and may be accurate. It was noted that the Carlson method might still even under compensate some plaintiffs. See 462 U.S. at 550-51, n.31 and accompanying text, 103 S.Ct. at 2557 n.31 and accompanying text. This Court left it open for the parties to select such a method it desired.

In this case, respondent's evidence on damages came in without objection. Petitioner chose not to present evidence on or argue the application of a discount rate to reach present value. It's strategy was to argue about how many dollars one could earn per annum given a particular size of award and market interest rate, leaving the principal intact. See, Petition at 4-5, n.1.

Given the above described method used by respondent to present the issue of damages, and the railroad's choice of strategy, no actual prejudice can be demonstrated on this record.

still be denied because this Court's prior cases hold, as a matter of federal substantive law, that when the trial court in a FELA action gives a proper general damage instruction (as was done in the instant case), there is no error in failing to give a present value instruction, unless the defendant railroad has requested a proper present value instruction. Under this Court's prior decisions, a general damage instruction, such as the one drafted and submitted by the petitioner railroad and given by the trial court in the instant case, is a proper and adequate statement of the federal substantive rules as to damages and that—in the absence of a request by the defendant for a proper present value instruction—no further instruction of any sort with respect to present value need be given. In short, the result reached by the Court below is completely in accord with settled federal substantive law, and the judgment, therefore, does not warrant review by this Court, under the criteria set forth in Rule 17 of this Court's Rules.

In *Chesapeake & Ohio Railway Company v. Kelly,* 241 U.S. 485, 36 S.Ct. 630 (1916), this Court held that in an FELA action a defendant railroad, **which had requested a proper present value instruction,** was entitled upon that request to have said instruction given in an FELA action tried in the state court. That holding was reiterated most recently by this Court in *St. Louis-Southwestern Railway Company v. Dickerson,* 470 U.S. ____, 105 S.Ct. 1347, 84 L.Ed.2d 303 (1985). The holdings in these two cases are identical: When an FELA defendant railroad **requests** a proper present value instruction, said instruction must be given. This Court on the other hand has **never** held that, in the **absence of a request by a defendant railroad,** a present value instruction must be given.

As stated above, this Court's holding in *Chesapeake & Ohio Railway Company v. Kelly,* set forth in the rule regarding a proper present value instruction **requested by defendant railroad.** Only two years later, in the case of *Louisville & N.R. Co. v. Holloway,* 247 U.S. 525, 38 S.Ct. 379 (1918), this Court held expressly that in an FELA action where a proper, although

general, damage instruction had been given, and **no request** for a proper present value instruction was made by the defendant railroad, there was no error in the trial court's having not given any such instruction. In the *Holloway* case, the state trial court gave the following damage instruction:

> "The measure of recovery if you find for the plaintiff, being such an amount in damages as will *fairly and reasonably compensate* the widow of the said John G. Holloway, deceased, for the loss of pecuniary benefits she might reasonably have received if the deceased had not been killed, not exceeding the amount claimed; to wit: $50,000."

Louisville & N.R. Co. v. Holloway, 246 U.S. 525, 38 S.Ct. 380, n.1. (Emphasis supplied). Notably, the instruction given in the *Holloway* case was substantially identical to the instruction given by the trial court, at petitioner's behest, in the instant case. The instruction in the instant case was as follows:

> "If you find the issues in favor of plaintiff, then you must determine the total amount of plaintiff's damages to be such sum as you believe will *fairly and justly compensate* plaintiff for any damages you believe he sustained and is reasonably certain to sustain in the future as a direct result of the occurrence of February 24, 1977. Any award you make is not subject to income tax." (L.F.)

Defendant railroad in *Holloway,* nevertheless contended that it was error for the trial court to give such instruction but fail to give a supplemental present value instruction. Specifically, defendant railroad's assignment of error was as follows:

> "That the Court of Appeals erred in approving the giving of an instruction and the refusal of another [footnote omitted] by which the trial court had denied to the company the benefit of the rule declared in *Chesapeake & Ohio Ry. v. Kelly,* 241 U.S. 485, 491, 36 Sup. Ct. 630, 60 L.Ed. 1117, L. R. A. 1917F, 367, that in computing damages recoverable for the deprivation of future financial

benefits, *the verdict should be based on their present value.*"

This Court, in rendering its decision affirming the judgment for plaintiff in *Holloway* noted first of all that the instruction given by the trial court (which is nearly identical to the one given in the instant case) was a proper and adequate statement of the measure of damages to be afforded plaintiff and that also, in the absence of any request for a proper supplemental instruction on present value, no error occurred and the judgment in favor of plaintiff must be affirmed. Expressly, this Court held:

> "[1-4] First. *The instruction given, though general, was correct.* It declared that the plaintiff was entitled to recover "*such an amount in damages as will fairly and reasonably compensate*" the widow for the loss of pecuniary benefits she might reasonably have received" but for her husband's death. This ruling did *not* imply that the verdict should be for the aggregate of the several benefits payable at different times, **without making any allowance** for the fact **that the whole amount of the verdict would be presently paid at one time. The instruction bore rather an implication to the contrary; for the sum was expressly stated to be that which would "compensate".** The language used was similar to that in which this court has **since expressed,** in *Chesapeake & Ohio Ry. v. Kelly, supra,* 241 U.S. 489, 36 Sup. Ct. 630, 60 L.Ed. 1117, L. R. A. 1917F, 367, the measure of damages which should be applied. **The Company had, of course, the right to require that this general instruction be supplemented by another calling attention to the fact that, in estimating what amount would compensate the widow, future benefits must be considered at their present value. But it did not ask for any such instruction.** Instead it erroneously sought to subject the jury's estimate to two rigid mathematical limitations: (1) That money would be worth to the widow six per cent., the legal rate of interest; (2) that the period during which the future benefits would have continued was

> 28.62 years—the life expectancy of the husband according to one of several well known actuarial tables. The Company was not entitled to have the jury instructed as matter of law either that money was worth that rate, or that the deceased would not in any event have outlived his probable expectancy. See *Chesapeake & Ohio Ry. v. Kelly, supra,* 241 U.S. 490-492, 36 Sup. Ct. 630, 60 L. Ed. 1117, L. R. A. 1917F, 367. Nor need we determine whether the **local rule of practice,** that if instructions are offered upon any issue respecting which the jury should be instructed and they are incorrect inform or substance it is the duty of the trial court to prepare or direct the preparation of a proper instruction upon the point in place of the defective one, see *Chesapeake & Ohio Ry. v. De Atley,* 241 U.S. 310, 316, 36 Sup. Ct. 564, 60 L. Ed. 1016), was applicable in the case at bar. **That is a question of state law, with which we have no concern."**

Louisville & N.R. v. Holloway, 246 U.S. 525, 38 S.Ct. 279 (Emphasis supplied). The *Holloway* decision, therefore, makes it abundantly plain that a general damage instruction advising that the jury must **"fairly and reasonably compensate"** plaintiff is substantively **correct** and **adequate** unless defendant railroad has drafted, offered and requested that the trial court **supplement** that instruction by advising the jury that in awarding the amount that would "fairly and reasonably compensate" the plaintiff, "future benefits must be considered at their present value". In the instant case, the instruciton that the jury award "such sum as you believe will fairly and justly compensate plaintiff" was substantively correct and adequate. In the instant case, as in *Holloway,* defendant railroad had the right to but failed to request further proper instruction that "future benefits be considered at their present value". Consequently, the damage instruction given was substantively correct and adequate and no error could occur as a matter of federal substantive law in the absence of a request by the railroad for further instruction on the issue of present value.

This Court's decision in *Holloway* further uerscores that, as a matter of substantive iaw, it is solely defendant's duty to draft, submit and request a *proper* present value instruction. In the absence of defendant drafting, submitting and requesting a *proper* present value instruction the trial court has no duty—as a matter of federal substantive law—to instruct on the issue of present value. Furthermore, neither plaintiff nor the trial court has any duty to correct an improper present value instruction offered by a defendant or to submit one on their own. The court's only duty is to give a proper present value instruction after defendant has drafted, submitted and requested the *proper* instruction be given.

Approximately ten years after the *Holloway* decision, this Court unequivocally reiterated the principle that the defendant railroad, in an FELA case, has *the burden of requesting a supplemental present value instruction* if it is dissatisfied with the instruction on damages given by the Court. In *Western & Atlantic R.R. v. Hughes,* 278 U.s. 496, 500, 49 S.Ct. 231, 232 (1929) this Court stated the following:

> "The railroad argues also that the **charge failed to make it clear to the jury that, in computing the damages recoverable for the operation of future benefits, adequate allowance must be made, according to circumstances, for the earning power of money, that the verdict should be for the present value of the anticipated benefits,** and that the legal rate of interest is not necessarily the rate to be applied in making the computation. *Chesapeake & Ohio Ry. Co. v. Kelly,* 241 U.S. 485, 491, 36 S.Ct. 630, 60 L.Ed. 1117; *Gulf, Colorado & Santa Fe Ry. Co. v. Mosler,* 275 U.S. 133, 48 S.Ct. 49, 72 L.Ed. 200. **There is no room for a contention that the charge failed to state correctly the applicable rule. If more detailed instruction was desired, it was incumbent upon the Railroad to make a request therefor. Louisville & Nashville R. Co. v. Holloway,** 246 U.S. 525, 38 S.Ct. 379, 62 L.Ed. 867. It did not do so.
>
> Affirmed."

The rules pertaining to present value instructions in FELA cases as enunciated by this Court in *Kelly, Holloway* and *Hughes* may be stated as follows: A damage instruction which makes no express reference to present value, but rather generally instructs the jury to "compensate" plaintiff, is proper and adequate and need not be further supplemented, unless the FELA defendant requests a further proper present value instruction. It is incumbent upon the defendant railroad, if it is dissatisfied with the trial court's damage instruction, to request further, supplemental instruction on present value. In the absence of such a request by defendant railroad, a general damage instruction such as the one given in the instant case is substantively proper and adequate.

This Court's decisions clearly repudiate the unarticulated assumption upon which the Petition is based: that is, Petitioner assumes that the trial court had a duty to give a present value instruction, *sua sponte,* as a matter of federal substantive law, notwithstanding petitioner's failure to voice any dissatisfaction at trial with the damage instruction (which petitioner prepared) or to request any instruction whatsoever at trial with respect to present value. This Court's decision refutes said assumption. Petitioner has sought to obscure this deficiency by dwelling on a diversionary discussion of the retroactivity of *Dickerson,* a matter which is not really in dispute. *Dickerson* applies to all cases pending on direct appeal provided, of course, the railroad has met the substantive federal threshhold requirement for entitlement to the present value instruction—asking the trial court to give it. This petitioner did not do. Similarly, application of *Dickerson* also presupposes that the railroad defendant has properly raised the issue and preserved it under state procedural law. Petitioner, however, has also failed to do this. Petitioner seeks to obfuscate its failure to raise and preserve the issue by requesting that this Court apply the "cause and actual prejudice" standard and relieve petitioner from its procedural default. This contention completely disregards the special role and scope of habeas corpus jurisdiction as a matter of both

federal constitutional and statutory law and the broad power of the habeas court to exercise equitable power to excuse procedural defaults from the jurisdiction limitations which are rigidly observed by this Court on direct review. Petitioner's contentions are, therefore, without merit.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Honorable Court is without jurisdiction of the questions petitioner seeks to present. Apart from objections to jurisdiction, the result reached by the court below is entirely in accord with settled federal substantive law and the judgment accordingly does not warrant review by this Court. For these reasons, it is further respectfully submitted and urged that the petition for writ of certiorari in the instant case should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

[461] THE COURT: Now, I'm handing the instructions to the attorneys for their perusal, and those are the copies, and you ought to make your record now, gentlemen.

MR. FRIEDMAN [Respondent's counsel]: Your Honor, on the record, I think it should be noted and made clear that we had our settlement conference yesterday afternoon when we went through the **[462]** instructions and at that time the plaintiff offered to utilize M.A.I. 24.01 and 8.02 for FELA cases as set forth in M.A.I. At that time Mr. Tucker indicated to the Court and to me that he intended to offer instructions which are not contained in M.A.I. and which reflect the comparative fault set forth in Gustafson and which has followed thereafter.

This morning we have agreed and I have agreed not to give the M.A.I. FELA Instruction 24.01 and 8.02 and the form of verdict instruction but I have agreed to comply with Mr. Tucker's request to submit this case in the manner in which requested by Mr. Tucker and as a matter of fact plaintiff's verdict director is one that was in fact offered — and we have agreed and stipulated that these instructions would be given by agreement and by stipulation of counsel and that no issue would be raised with respect thereto in the event there's an appeal of this case.

MR. TUCKER [Petitioner's counsel]: I've agreed we can go on the contributory fault. I'm not saying any issue won't be raised.

MR. FRIEDMAN: If you're raising an issue about going under contributory fault —

MR. TUCKER: I won't raise an issue about going under contributory fault but I'm not raising any other question I have to the form of the instruction.

[463] MR. FRIEDMAN: I want the record clear that the form of the instructions, the form of the instructions that were offered by you and were given by you —

MR. TUCKER: No, I didn't offer them. I had a set here.

MR. FRIEDMAN: Which we used.

MR. TUCKER: I don't know what you used, Marshall. I can't tell you what you used, I don't know.

MR. FRIEDMAN: You withdrew — Well, then would you please bring out — we'll use your instructions.

MR. TUCKER: Well, you've submitted your instructions.

MR. FRIEDMAN: I'll use your form. You've had an opportunity to review this instruction.

MR. TUCKER: These are your instructions. I'll agree that we can go under contributory fault. I'm not waiving any other objection I have as to the form of the instructions.

MR. FRIEDMAN: Well, then I want to see the instructions that you offered because I'm going to have them marked. I'll have an instruction marked as the verdict director that's been submitted by the defendant. I'd like to have that marked as an exhibit. **I'd like to have the other instructions then which you have offered, so that it's clear in the record that these instructions that are [464] given by the Court are the identical instructions that were offered by the defendant.**

MR. TUCKER: I'll agree to that.

MR. FRIEDMAN: You'll agree that the instructions given by the Court are the identical instructions that have been offered by the defendant?

MR. TUCKER: Well, I haven't really offered them but I submitted them to the Court and they were returned to me.

THE COURT: Are they the same in wording?

MR. TUCKER: Yes.

MR. FRIEDMAN: These are being given by agreement and no issue will be raised with respect to these instructions on appeal because they've been given by agreement of both parties.

MR. TUCKER: I'll not raise any issue as to submitting the instructions on the basis of contributory fault but I'm not waiving any objections I may have to the instructions — any general objections I may have to the instructions, or specific objections.

THE COURT: You mean in that one instruction?

MR. TUCKER: Yes.

MR. FRIEDMAN: But we're giving the instruction that you offered.

MR. TUCKER: You're giving an instruction that is **[465]** the same as the one I would have offered.

MR. FRIEDMAN: That you did offer.

MR. TUCKER: No, I didn't offer it.

MR. FRIEDMAN: I have one. Could we have the other instruction that you offered?

MR. TUCKER: Now wait a second. I'm not waiving any objection to these instructions, Mr. Friedman. I'll agree that we can go on contributory fault. I agree that the instruciton you submitted is the same instruction I would have submitted, tendered, if you had gone under the old M.A.I. 24.01.

MR. FRIEDMAN: You agree that the instructions that the Court is giving in this case is in the same wording and in the same form as the instructions that you submitted to the Court and offered to the Court in the event we would have submitted under the M.A.I. 24.01?

MR. TUCKER: Yes.

THE COURT: That seems to do it.

Take a look at those instructions, genetlemen, and any objections, other than that one, —

MR. TUCKER: I would like to enter my objection to these — my general objection to these instructions. I reserve any specific objections I have until later.

MR. FRIEDMAN: I would for the record like to ask Mr. Tucker again, state on the record, that we have reviewed **[466]** all of these instructions with the Court, the form of the instructions given under comparative fault are the form that has been submitted and agreed upon by the defendant and if the defendant has any thoughts, any error or any problems with any of the instructions in this case under the recent Opinion of our Missouri Supreme Court I'm asking the defendant to advise the Court of any deficiencies or any problems with the instructions that are being given by the Court.

MR. TUCKER: I reserve my right to make any specific objections to these instructions at a later time afterwards.